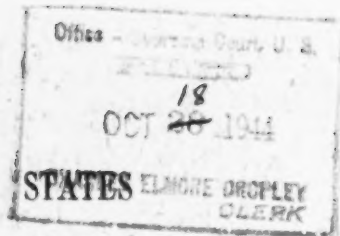


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,

Petitioner.

v.

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, DEPARTMENT OF LABOR**

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT AND BRIEF IN SUPPORT THEREOF**

JAMES F. EGAN,
Counsel for Petitioner.

**JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,**
Of Counsel.

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE
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**PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT**

*To the Honorable the Justices of the Supreme Court of the
United States:*

The undersigned, on behalf of the above-named petitioner, prays that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit, rendered July 20, 1944, in the case between the above-named parties, docketed therein as Number 3979.

I

Summary and Short Statement of the Matter Involved

This is an action brought in the District Court of the United States for the District of Massachusetts by Thomas

W. Holland, Administrator of the Wage and Hour Division, United States Department of Labor (for whom by stipulation of parties L. Metcalfe Walling was substituted by order of said District Court), against A. H. Phillips, Inc., petitioner herein. This action was brought to enjoin this petitioner from allegedly violating the provisions of Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chap. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, et seq.) (R. 2)

This petitioner is a Massachusetts corporation solely engaged in the business of selling at retail food and other grocery items. It operates forty-nine separate retail stores, forty of them in Massachusetts and nine in Connecticut, all within a radius of thirty-five miles of Springfield. Its office and warehouse are in one building in Springfield, Massachusetts. (R. 11)

The Massachusetts business constitutes 82% of its total volume; that of Connecticut, 18%. It does an annual business of about \$1,500,000. The greater part of the time of its warehouse and office employees is devoted each week to work relating to goods which are to be sold through the Massachusetts stores. (R. 11, 12, 17)

In the District Court this petitioner filed an answer setting forth, among other defenses, the point raised in the Circuit Court of Appeals and which forms the basis of this petition, viz, that the Fair Labor Standards Act does not apply to petitioner nor to petitioner's employees, none of whom is subject to the provisions of Sections 6 and 7 of said Act under the exemptions provided in Section 13(a) (2) thereof.

Section 13(a) (2) of the Act provides as follows:

“The provisions of section 6 and 7 (Minimum Wages, Maximum Hours) shall not apply with respect to * * * any employee engaged in any retail or service estab-

lishment the greater part of whose selling or servicing is in intrastate commerce." (Matter in parentheses is ours)

The facts were stipulated by the parties hereto and were adopted by the District Court as its findings of fact. (R. 11)

The District Court found that the petitioner is not a "retail establishment" within the meaning of said section 13 (a) (2), and concluded that the employees of the central office and warehouse are subject to the provisions of the Act and judgment accordingly was entered. (R. 18, 19, 20)

The Petitioner appealed to the Circuit Court of Appeals for the First Circuit which Court affirmed the judgment of the District Court. (R. 30)

II

The Jurisdiction of the United States Supreme Court

The date of the judgment sought to be reviewed is July 20, 1944.

The jurisdiction of the Supreme Court of the United States is invoked under Section 240(a) of the Judicial Code.

III

The Question Presented

Is the petitioner a retail establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act?

IV

Reasons Relied on for the Allowance of the Writ

The Circuit Court of Appeals for the First Circuit has rendered a judgment in this case in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court because the enforcement of the Fair Labor Standards Act carries serious civil and criminal consequences, and variations in its enforcement are productive of harm.

Wherefore it is respectfully submitted that the petition should be granted.

JAMES F. EGAN,
Attorney for Petitioner.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Of Counsel.

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, DEPARTMENT OF LABOR

Respondent

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

The facts upon which the petition is based appear in the petition and need not be stated here.

The opinion of the judge of the District Court is found in 50 Fed. Supp. 749 and is in the record at p. 11.

The opinion of the Circuit Court of Appeals was filed on July 20, 1944, has not yet been reported, and is in the record at p. 23.

Argument

It is the contention of the petitioner that it is a "retail establishment" within the meaning of the exemption in section 13(a) (2) of the Fair Labor Standards Act. In deciding to the contrary the District Court and the Circuit Court of Appeals for the First Circuit did not pass to a

consideration of the other requirements under said section 13(a) (2), and which requirements, it is contended, are shown by the record to be met by petitioner.

In its opinion in this case the Circuit Court of Appeals for the First Circuit recognizes that there is a conflict of decisions on the point raised by the petition. (R. 25)

“ * * * the appellant maintains that it is a retail establishment, the greater part of whose selling is in intrastate commerce, and that, therefore, its employees are exempted from the operation of the Act under Section 13(a) (2). It insists that the word ‘establishment’ means appellant’s entire business organization. It finds support for its contention in *Walling v. L. Wiemann Co.*, 138 F. (2d) 602 (C. C. A. 7th, 1943) cert. den. March 13, 1944, and *Allesandro et al. v. C. F. Smith Co.*, 136 F. (2d) 75 (C. C. A. 6th, 1943) and certain district court decisions. We do not agree. We think that the more persuasive authorities support the construction that the word ‘establishment’ means a single place of business.”

Again in its opinion the Circuit Court of Appeals for the First Circuit states its agreement with the dissenting opinion in the case of *Walling vs. Block*, 139 F. (2d) 268, C. C. A. (9th) cert. denied March 27, 1944. The Block case involved a chain of nineteen retail shoe stores operating in three states with an office and warehouse in Seattle. The majority opinion in the Block case held the office and warehouse employees excluded from coverage under Section 13(a) (2) of the Act and affirmed the dismissal by the District Court of the Administrator’s suit.

Opinions of Circuit Courts of Appeals at variance with the opinion of the Circuit Court of Appeals for the First Circuit herein are:

Walling v. L. Wiemann Co., 138 F. (2nd) 602 (C. C. A. 7th, 1943) cert. den. March 13, 1944, wherein it was

held that the 16 separate retail stores and a separate general office and warehouse operated by a Wisconsin corporation in 5 cities in that state, together constitute a retail establishment within the meaning of Sec. 13(a) (2) of the Fair Labor Standards Act.

Allesandro et al. v. C. F. Smith Co., 136 F. (2nd) 75 (C. C. A. 6th, 1943) wherein it was held that a grocery chain operating several hundred stores and several warehouses in Michigan was a retail establishment within the meaning of Sec. 13 (a) (2) of the Fair Labor Standards Act.

See also *Lonas v. National Linen Service Corp.*, 136 F. (2nd) 433 (C. C. A. 6th, 1943) cert. den. Nov. 8, 1943, wherein the words "service establishment", as used in Sec. 13(a) (2) of the Act, were held to include a linen supply concern with a main office in Atlanta and plants in various states.

Walling v. Block, 139 F. (2nd) 268 (C. C. A. 9th, 1943) cert. den. March 27, 1944, discussed supra.

This point has received considerable attention from District Courts, and opinions there at variance with the opinion of the Circuit Court of Appeals for the First Circuit herein are:

Walling v. Fred Wolferman Inc., 54 F. Supp. 917;

Veazey Drug Co. v. Fleming, 42 F. Supp. 689;

White v. Jacobs Drug Store, 47 F. Supp. 298;

Duncan v. Montgomery Ward Company, 42 F. Supp. 879;

Walling v. Wards Cut-Rate Drugs, March 11, 1944, D. C. N. D. Texas.

Conclusion

The petitioner respectfully urges that the conflict in views upon the point here raised, and the serious consequences to

the petitioner and other persons engaged in businesses affected by these contrary views, merit the attention of the Supreme Court of the United States to the end that this conflict may be resolved.

Wherefore your petitioner prays that a writ of certiorari issue from this Court directed to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

JAMES F. EGAN,
Attorney for the Petitioner.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Of Counsel.

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